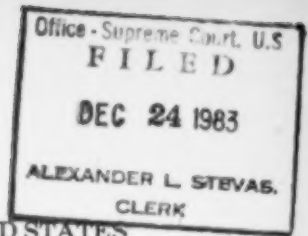


83 - 1110



No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANN RUPLE, Petitioner

V

CITY OF VERMILLION, SOUTH DAKOTA
A Municipal Corporation, et al.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an employee of a municipal corporation, who has been summarily discharged from her employment, and who commences an action in state court arising out of alleged violations of state statutes relating to breach of employment contract and defamation, to avoid the preclusive effect of an adverse state court judgment, is required, as a matter of law, to also plead and litigate in state court, pursuant to 42 USC §1983 and §1985, claims arising out of violations of her United States constitutional and civil rights.

PARTIES TO THIS PROCEEDING

The following is a list of all parties to the proceeding in the United States Circuit Court of Appeals, whose judgment is hereby sought to be reviewed:

Petitioner, Ann Ruple.

Respondents, City of Vermillion, South Dakota, a Municipal Corporation; Carl Weinaug, Individually and as City Manager for the City of Vermillion, South Dakota; Charles Woodman, Individually and as Mayor of the City of Vermillion, South Dakota; Dorn Van Cleave, Archie Teigen, James Julin, James Guffey, Willard Powell, and Loren Carlson, as duly elected, qualified and acting Aldermen in and for the City of Vermillion, South Dakota.

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OPINIONS BELOW

The August 19, 1983, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 714 F.2d. 860, and is reprinted in the separate Appendix to this Petition as A-1. The prior opinion of the United States District Court for the District of South Dakota, Southern Division, is also reprinted in the Appendix as A-2.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1983. Order denying petition for rehearing and suggestions for rehearing en banc was entered on September 28, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS

This case involves the following Constitutional and statutory provisions:

United States Constitution

Amendment I

Congress shall make no law respecting

an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C., Section 1983

Every person who, under color of any statute, ordinance, regulation, custom or

useage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In April of 1982, Petitioner, Ann Ruple, instituted a civil rights action in the United States District Court for the District of South Dakota, Southern Division, to vindicate the deprivation of her constitutional rights under the First and Fourteenth Amendments to the Constitution pursuant to Sections 1983 and 1985 of Title 42 of the United States Code and the jurisdictional counterpart, 28 U.S.C., Sections 1331(a) and 1343(3). The suit was filed against the Respondents - the City of Vermillion, South Dakota, its City Manager and various members

of its board of Aldermen.

The genesis of the action was Petitioner's summary discharge from her position as city finance officer without adequate notice or a reasonable opportunity to be heard to clear her name of inferences of dishonesty which impuned her integrity and damaged her standing in the community. Petitioner alleged that she had been deprived of property (her job) and liberty (her reputation) without due process of law.

Prior to commencement of the instant action, Petitioner had commenced an action in South Dakota state court against some of the same Defendants named herein. In her state court action, Petitioner alleged a violation of South Dakota Statutes relating to employment contracts and defamation. Before state court fact issues were joined or any evidence was received, upon motion by Defendants, the state trial court granted judgment against Petitioner for the reasons that (1) under South Dakota statutes, Petitioner

was an employee at will of Defendant City of Vermillion, and that the Defendants were prohibited by South Dakota law from entering into a long term employment contract with Petitioner; and, (2) that Defendants were immune from the defamation claims due to protections afforded by South Dakota statutes relating to sovereign immunity.

In her state court action, Petitioner neither alleged, presented any evidence, nor argued a violation of her constitutional or civil rights.

Thereafter, the United States District Court granted Defendants' motion for summary judgment in the case at bar by application of the doctrine of res judicata in reliance upon the general thrust of a line of cases decided by the Court of Appeals for the Eighth Circuit wherein res judicata was applicable if the plaintiff could have, but elected not to litigate, in state court, constitutional and civil rights issues arising out of the same general factual

predicate as claims arising out of violations of state laws.

REASONS FOR GRANTING THE WRIT

I.

Substantive issues in the case at bar are identical to issues argued on October 11, 1983, to the United States Supreme Court in the case of Migra vs. Warren City School District Board of Education, Supreme Court No. 82-738.

In Migra, as in the instant case, the salient issues were as follows:

1. The adjudication by a state court of an action based on the statutes and common law of the state does not bar a civil rights action in Federal Court between the same parties on matters which were not litigated and which were not essential to the issues or points in controversy in the state court.

2. South Dakota (Ohio) follows and adheres to the traditional doctrine of res judicata as expressed by the common law and enunciated by this Court in Cromwell vs.

County of Sac, 94 U.S. 351.

3. Petitioner's First Amendment claim is not barred by the judgment in the state court.

4. The summary discharge of Petitioner caused injury to her reputation, implicating liberty and property interests sufficient to invoke the procedural protections of the due process clause of the Fourteenth Amendment.

In Migra the United States Supreme Court will probably, for the first time, decide whether a plaintiff should be barred from litigating in Federal Court, Section 1983 damage claims that were never raised, argued or decided in a prior state court proceeding simply because the plaintiff had an opportunity to raise such claims in the state court proceeding, but elected not to do so.

If the United States Supreme Court, in Migra, enunciates a modified rule of claim preclusion to be applied in Section 1983 claims; and, subject to application of the

doctrine of Collateral Estoppel, permits a plaintiff to elect to litigate Section 1983 actions in federal court, the Petitioner herein should be entitled to benefit from such decision.

If the Supreme Court in Migra upholds the application of res judicata by the Sixth Circuit Court of Appeals, Petitioner herein concedes that such a decision would finally decide the issues presented by this Petition.

However, unless Petitioner's case remains viable until the Supreme Court decides Migra a favorable ruling therein would be of no benefit to this Petitioner.

II.

The decision below is contrary to the established doctrines of res judicata and collateral estoppel generally adhered to by this Court, and it violates the principles enunciated in Allen vs. McCurry, 449 U.S. 90 (1980). The decision raises significant and recurring problems with respect to the preclusive effect of a state court judgment

vis-a-vis federal constitutional protections.

The question again before this Court may be stated as follows: is petitioner precluded from litigating her civil rights claims in federal court simply because of the previous adjudication of common-law and state statutory issues in an earlier state court action between the same or similar parties?

The Eighth Circuit affirmed the dismissal of Petitioner's Section 1983 action summarily. A cursory reading of Petitioner's complaint herein as compared to issues and proceedings raised by her in state court will readily disclose the serious error below. The district court misapprehended, or ignored, the nature of Petitioner's claims and mechanically misplaced the doctrine of res judicata. It is significant to note that the district court applied the bar of res judicata to all of Petitioner's federal claims even though such claims were never before the state court. The district court

misconstrued Petitioner's allegations regarding violation of her liberty interests, her good name, reputation, honor and integrity as having been considered and decided by the state court when it summarily dismissed Petitioner's state court claims relating to breach of employment contract, by application of a statutory defense, and her state court claim of defamation, by application of the defense of sovereign immunity provided by state law.

Both the district court and the Court of Appeals mechanically applied the doctrine of res judicata to preclude Petitioner from pursuing claims in federal court which arose neither from the same essential facts nor the same laws as the state court claims.

The rationale applied by both the district and Appeals Court was inappropriate and inequitable under the facts and circumstances herein. Petitioner has been deprived of her day in court, and the decisions of the courts below are superficial.

In other words, the courts below decided that a Section 1983 claimant is precluded from invoking the jurisdiction of the federal court simply because he or she could have litigated the claim in state court. With no name-clearing hearing awarded the Petitioner, the district court found, nonetheless, that the bar of res judicata was appropriate to the claim of stigmatization because "(1) Plaintiff's action arises from the same operative nucleus of facts; (2) that these facts were adequately determined against the plaintiff in the state court action; (3) that plaintiff could have raised these issues in that action."

Allegations contained in Petitioner's federal action are broader than her state court claims relating to defamation. The appropriate and effective response to the rational of the lower courts is found in the concurring opinion of Justice Harlan in Monroe vs. Pape, 365 U.S. 167, wherein he declared:

"...A deprivation of a constitutional right is significantly different from and more serious than a violation of a state right, and, therefore, deserves a different remedy even though the same act may constitute a state tort and the deprivation of a constitutional right."

Justice Harlan, in Pape, stated further:

"It would indeed be the purest coincidence if the state remedies for violations of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the constitution provides protection."

The decision of the Eighth Circuit in the case at bar is in clear disregard of the rationale and decision of this Court in Allen vs. McCurry, 449 U.S. 90 (1980). The record discloses that Petitioner's state court claims were summarily dismissed, before the issues were joined, by application of statutory defenses arising out of state law, which defenses are not available to Respondents in a Section 1983 action.

The issues adjudicated in the State Court are not at all the equivalent of a

Section 1983 proceeding. The doctrine of res judicata can operate as a bar only in a situation where the subsequent suit between the parties or their privies is on the same cause of action. Unless the subsequent suit is predicated on the same claim or cause of action as that of the earlier suit, res judicata can have no application whatsoever. However, where the subsequent cause of action or claim is not the same, but there is an identity of parties, a point of law or a fact which was fully and fairly litigated, may not be drawn into question in the subsequent suit. This Court in Montana vs. United States, 440 U.S. 147, 153 in considering the principle of collateral estoppel, stated that once a Court has decided an issue of fact of law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the case.

Allen vs. McCurry involved a suit for violation of civil rights under 42 U.S.C.,

Section 1983. McCurry was convicted of possession of heroine and of assault with intent to kill in the state court. His motion to suppress certain evidence that had been seized by the police in the alleged violation of his Fourth and Fourteenth Amendment rights had been denied by the state court. McCurry failed to assert that the state courts had denied him a "full and fair opportunity" to litigate his claims that a police search of his house was illegal, and thus he was barred by Stone vs. Powell, 428 U.S. 465 (1976), from seeking a federal habeas corpus writ. Later McCurry brought suit for damages under Section 1983, alleging a conspiracy to violate his rights by an unconstitutional search and seizure of his house. The federal district court granted summary judgment for the defendants holding that the doctrine of collateral estoppel prevented McCurry from relitigating the search and seizure question already decided against him in the state courts. The Court of Appeals reversed on the

ground that collateral estoppel, though generally applicable to Section 1983 actions, is not appropriate in this case because the 1983 suit was the only route to a federal forum for McCurry to assert his constitutional claim. The opinion of this Court reversed and remanded. The majority opinion written by Justice Steward, pointed out that there is nothing in the language of Section 1983 or its legislative history that indicates any congressional intention of denying binding affect to a state court judgment which actually and directly adjudicated a federal constitutional claim. The minority opinion written by Justice Blackmun, and joined in by Justices Brennan and Marshall, stated that the remedy sought in a Section 1983 action is totally different from the relief sought by McCurry in a state criminal trial, and therefore, that the federal court should be the final arbiter of his federal constitutional civil rights claim.

Based upon the factual record in this

case, Petitioner's Complaint herein finds support in the majority and minority opinions in Allen vs. McCurry. In Allen, this Court was confronted with a factual situation wherein the complainant sought to litigate, had a full and fair opportunity to litigate, and did litigate the federal constitutional claim in the state court. McCurry was actually seeking to relitigate this identical federal claim in his civil rights action in the federal court.

In the instant case, the record is clear and unequivocal that the Petitioner did not submit her 1983 claims, or any constitutional claims, to the state court for determination, and, therefore, there is no decision of that court on any of the federal issues presented to the district court. The crux of the Allen vs. McCurry decision is, that McCurry had properly and fully litigated his federal claim in the state court. According to the traditional doctrines of claim preclusion, res judicata does not ap-

ply when the subsequent suit is on a different cause of action. We believe it is beyond dispute in this case that the cause of action asserted by Petitioner in federal court is clearly different from the causes of action alleged and summarily dismissed in the state court. It follows, therefore, that the doctrine of res judicata is not applicable to this case.

Both courts below barred Petitioner's federal action by application of res judicata, and neither court even mentioned the principle of collateral estoppel. This principle, in essence, prohibits the relitigation of any issues actually decided after a full and fair hearing in a prior action. There is no support, whatsoever, in the record of this case to justify invocation of the doctrine of collateral estoppel. Petitioner herein is not attempting to relitigate a federal claim which has been fully and directly litigated in another court of competent jurisdiction. A court may not consider and adjudicate a claim unless that

claim has been submitted to it by proper pleadings according to established judicial rules of procedure and practice. The character of a cause of action is determined by the allegations contained in the complaint. It is not unusual for one particular set of operative facts to give rise to different actions. There can be no valid contention of "relitigation" or "adjudication" where a claim has not been asserted and properly litigated in a court of competent jurisdiction. This Court in McCurry accorded a binding effect to the state court judgment because that court actually and properly adjudicated the federal constitutional issue which McCurry sought to relitigate in connection with a civil rights action subsequently filed by him in federal court. In fact, McCurry had requested the determination of the federal issue by the state court. The significant term used by this Court is "relitigate". Before the concept of "collateral estoppel" may be applicable, the point of

law or of fact, drawn in question in a subsequent suit must have been actually and fully litigated in the prior action. The record in the instant case is devoid of any support for the conclusion that Petitioner sought to litigate or did litigate her federal constitutional claims in the state court. The statement that a party had a "full and fair opportunity to litigate" an issue in an earlier case, presupposes that the issue was submitted to the court for determination, and was properly adjudicated by the court. The Petitioner did not submit federal claims to the state court in the prior action between the parties; and, therefore, she is not confronted, in the instant case, with a situation in which the state court decided a federal question adversely to her. Obviously, no preclusive effect arises where federal rights have not been presented to the state court for adjudication. The Eighth Circuit has committed prejudicial error in affirming the decision of the district court which barred the Petitioner from litigating

her federal claims in federal court.

CONCLUSION

Allen vs. McCurry brought about a divergence of views among the lower courts regarding the applicability of the preclusive doctrines of res judicata and collateral estoppel in the area of civil rights litigation.

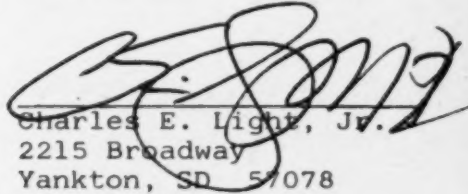
This Court has received briefs and heard argument in the case of Migra vs. Warren City School District Board of Education, Supreme Court No. 82-738, and it is anticipated that the Court will finally determine and establish the conditions under which res judicata and collateral estoppel are proper to preclude litigation of civil rights claims in federal court.

Substantive issues in the instant case are identical to issues presented in Migra, and the rights of the Petitioner herein should be determined by the decision of this Court in Migra rather than prior inconclusive and divergent opinions.

In view of the foregoing arguments, a

Writ of Certiorari should issue to review
the judgment and opinion of the Eighth
Circuit.

Respectfully submitted,



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Council for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1131

Ann Ruple,

Appellant,

v.

City of Vermillion,
South Dakota, a
municipal corporation;
Carl Weinaug,
Individually and as
City Manager of the
City of Vermillion,
South Dakota; Charles
Woodman, individually
and as Mayor of the
City of Vermillion,
South Dakota; and Dorn
Van Cleave, Archie
Teigen, James Julian,
and Loren Carlson, as
Aldermen of the City
of Vermillion, South
Dakota,

Appelles.

On Appeal from the
United States
District Court for
the District of
South Dakota

Submitted: June 16, 1983

Filed: August 19, 1983

Before LAY, Chief Judge, SWYGERT*, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

This action arises out of Ann Ruple's dismissal from her position as Finance Officer of the City of Vermillion, South Dakota. The defendants are the City, the City Manager, the Mayor, and four aldermen who voted to dismiss plaintiff. The District Court¹ dismissed the complaint on the ground of res judicata, holding that a prior judgment against the plaintiff in a state court barred the action. We affirm.

After her dismissal, plaintiff first sought relief in the Circuit Court for the First Judicial Circuit of South Dakota. She filed a complaint pleading theories of breach of contract and defamation. The complaint was dismissed on summary judgment.

* The Honorable Luther M. Swygert, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

1 The Honorable John B. Jones, United States District Judge for the District of South Dakota.

Ann Ruple v. Carl Weinaug, No. 82-10 (Mar. 26, 1982, Cir. Ct., Clay County, S.D.), and the judgment of dismissal has now been affirmed by the Supreme Court of South Dakota. Ruple v. Weinaug, 328 N.W.2d (S.D. 1983). The state courts held, among other things, that plaintiff's position as Finance Officer was terminable at the will of the City Council.

Plaintiff's present complaint, filed in the federal court after dismissal of her first complaint by the state trial court, alleges a violation of 42 U.S.C. §1983, in that she was deprived of property (her job) and liberty (her reputation) without due process of law, that is, without reasonable notice or hearing. Res judicata, of course, applies only if the second action is on the same "cause of action" as the first, and that is the principal issue raised by this appeal. At common law, the term "cause of action" was given a rather rigid and technical construction. That is, if someone

brought debt to recover possession of a specific thing, and the action was dismissed, a second action, this time in the form of detinue, would not be barred. The second case, it was said, was on a different "cause of action." The concept, though technical, had at least the virtue of clarity. More recently, the phrase "cause of action," or "claim," the term now favored by most courts, has been given a more practical construction. It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same "claim" or "cause of action" for purposes of res judicata. Since the forms of action have been abolished, and joinder of claims and amendment of pleadings are liberally permitted in both federal and state courts, there is no reason to give a claimant more than one fair chance to present the substance of his or her case.

Here, the effect of the prior judgment

is governed by the law of South Dakota, the law of the forum that rendered the judgment. See 28 U.S.C. §1738. If by the law a second action would be precluded in a state court, then it is also normally precluded in a federal court. There are exceptions to this principle, see Haring v. Prosise, 51 U.S.L. Week 4736, 4738 (U.S. June 13, 1983), but none of them applies here. The Supreme Court of South Dakota has recently made clear that it adheres to the practical definition of "cause of action" just discussed, Golden v. Oahe Enterprises, Inc., 240 N.W.2d 102, 109-10 (1976), and on that basis we must conclude that this action is barred. There is no reason why plaintiff could not have presented her federal theories in the state court. All of her theories of relief arise out of her dismissal as Finance Officer, and they all depend upon a single series of transactions and occurrences. Absent special circumstances, all of the theories that a dismissed employee can bring to play to chal-

lenge the dismissal should be raised and decided in the same lawsuit. Cf. Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1982) (federal law); Brown v. St. Louis Police Department, 691 F.2d 393 (8th Cir. 1982) (Missouri law).

Plaintiff suggests several reasons why these principles should not apply to her case. First, she says that she never had a trial of the facts, and therefore did not have in the state courts a full and fair opportunity to litigate the validity of her discharge. The answer is that a judgment entered on a motion to dismiss or for summary judgment is just as binding as a judgment entered after a trial of the facts. Indeed, in a sense a plaintiff who has not even alleged a material issue of fact and who suffers summary judgment on that ground has met a more decisive defeat than one who has tried her case and lost by the verdict of the jury or the court. Here, the state court held that plaintiff's employment was

terminable at will, and that plaintiff had no claim for defamation because the publicity that was given to her discharge came as a result of her own action in handing to the press a copy of a confidential report prepared by the defendant City Manager. The state-court summary judgment reaching these conclusions on the basis of facts that were either undisputed, or as to which plaintiff had failed to raise a genuine issue, is fully entitled to res judicata effect. Cf. Vorbeck v. Whaley, 620 F.2d 191 (8th Cir. 1981) (per curiam) (state-court judgment based on motion to dismiss given res judicata effect in later federal-court suit under §1983).

Plaintiff also urges that she should benefit from the fact that some of the parties in the present case were not parties in the state court. In the state suit, plaintiff named as defendants the City and the City Manager. Here, she has added the Mayor and four members of the City Council. Again,

there is a short answer to this contention. The newly named defendants are in privity with those who were defendants in the state court. In other words, they are so closely related to the state-court defendants, and their interests are so nearly identical, that it is fair to treat them as the same parties for purposes of determining the preclusive effect of the state-court judgment. Any other rule would enable plaintiff to avoid the doctrine of res judicata by the simple expedient of not naming all possible defendants in her first action.

In sum, we agree with the District Court that the state-court bars this action.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * *

ANN RUPLE, * CIV 82-4054

Plaintiff, *

-vs- *

CITY OF VERMILLION, *
SOUTH DAKOTA, a *
Municipal Corporation; *
CARL WENAUGH, *
Individually and as *
City Manager for the *
City of Vermillion, *
South Dakota; CHARLES *
WOODMAN, Individually *
and as Mayor of the *
City of Vermillion, *
South Dakota; DORN *
VAN CLEAVE, ARCHIE *
TEIGEN, JAMES JULIN, *
JAMES GUFFEY, WILLARD *
POWELL, and LOREN *
CARLSON, as duly *
elected, qualified and *
acting aldermen in and *
for the City of *
Vermillion, South *
Dakota, *

Defendants. *

* * * * *

APPEARANCES:

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For the Defendant...Mr. Lawrence L. Piersol
and Mr. Michael J.
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MEMORANDUM OPINION

Ann Ruple, plaintiff, has brought this action under the Civil Rights Acts, 42 U.S.C. 1983, 1985, and 1986, for damages arising from her dismissal from her position as Finance Officer for the City of Vermillion. Defendants have moved this court for a summary judgment. The defendants base this motion on the doctrine of res judicata in that plaintiff instituted a similar action in state court. The state court action was grounded primarily on the theories of wrongful discharge; defamation of character, libel and slander. That action was decided adversely to plaintiff in the granting of a summary judgment in defendants' favor. Plaintiff apparently appealed that judgment and is still awaiting a decision on that appeal. In the interim, plaintiff has instituted the current action. This action is based on the

same facts concerning her dismissal from her position as Finance Officer. All that has changed is plaintiff's legal theory. Now she seeks to prove that these facts establish a violation of her civil rights. To do this she must first avoid the preclusive effects of the doctrine of res judicata.

The rule on the effect of res judicata in civil rights actions in this circuit is stated as follows:

[T]he principle of res judicata applies to the 1983 actions and operates as a bar to the relitigation and constitutional issues actually raised as well as to constitutional issues that could have been raised in a prior lawsuit if the second suit concerns the same operative nucleus of fact.

Robbins v. District Court of Worth Cty., Iowa, 592 F.2d 1015, 1017 (8th Cir. 1979). See Allen v. McCurry, 449 U.S. 90 (1980); Roach v. Teamsters Local Union No. 688, 595 F.2d 446 (8th Cir. 1979). To the extent that other circuits might hold a different view on res judicata in civil rights actions, I explicitly reject such views. See, Ornstein

1
v. Regan, 574 F.2d 115 (2nd Cir. 1978).

Applying the above rule to this action leads to the following conclusions: 1) that plaintiff's action arises from the same operative nucleus of facts; 2) that these facts were adequately determined against plaintiff in the state court action; and 3) that plaintiff could have raised these issues in that action. It does not matter that plaintiff has named additional defendants in this action. See, Allen v. McCurry, supra.

Under the doctrine of res judicata, therefore, the defendants' motion for summary judgment should be and hereby is granted, and forthwith ordered dismissed.

Pursuant to Rule 52, this memorandum opinion constitutes the court's findings.

Dated this 23rd day of December, 1982.

John B. Jones /s/
UNITED STATES DISTRICT
JUDGE